GOLDEN CENTURY DEVELOPMENT SDN. BHD. & ANOR.

v.

GAN HOE & ANOR.

FEDERAL COURT, JOHOR BAHRU
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 285 OF 1980]
9 MARCH & 7 OCTOBER 1982

LAND LAW: *Housing developers - Agreement for sale and purchase - Whether to be in writing - Payment of deposit/part payment - Effect of - Assignment of interest by purchaser - Conveyance of land by developer to second developer without the knowledge of purchaser - Whether agreement binding on the Second developer or the conveyance fraudulent.*

On or about 9 October 1978 the 1st respondent had agreed to purchase from the 1st appellant a piece of land together with a double storey terraced house erected thereon for RM55,000 by the 1st appellant according to the specifications contained in a brochure prepared by him.

A sum of RM1,000 was paid as deposit and part payment by the 1st respondent for which a receipt dated 9 October 1978 was issued. Subsequently the 1st respondent assigned all her interest in the property to the 2nd respondent for RM2,000 on 4 November 1978 and notified the 1st appellant of the assignment.

The 1st appellant having consented to the assignment sent to 2nd respondent's solicitors 3 sets of formal agreement form for execution. It was alleged that the terms of the agreement allegedly concluded earlier between the 1st respondent and the 1st appellant. Therefore the 1st appellant, was advised to amend the draft agreement to conform with the Rules and the earlier agreement, but instead he repudiated the agreement on 26 March 1980. Unknown to the respondents on 9 July 1979 the 1st appellant conveyed the land in question to the 2nd appellant.

The respondents claim that the 2nd appellant had knowledge of the 9 October 1978 agreement and therefore bound by it and alternatively the transfer was fraudulent. But the appellant urged that there was no formal agreement. The learned Judge decided in favour of the respondent and thus this appeal.

In the appeal it was argued that nowhere has the purchaser signed a document committing himself to purchase.

Held:
A summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable". In this case it was not obviously so.

[Appeal dismissed with costs. Deposit to respondent.]

Case referred to:
Yeo Leng Seng v. Lucky Park (Pte) Ltd. [1971] 1 MLJ 21 ***(refd)***

Legislation referred to:
Housing Developers (Control & Licensing) Rules 1970, rr. 10(3), 12
Rules of the High Court 1980, O. 18 rr. 19, (2)

For the appellants - P.K. Nathan; M/s. Nathan & Yang
For the respondents - N. Jegathesan; M/s. John Ang & Co.

JUDGMENT

Wan Suleiman FJ:

The appellants, who were defendants in the Court below, had applied by way of summons-in-chambers for an order "that the writ of summons and the statement of claim and the service thereof and all subsequent proceedings be set aside as these disclose no reasonable cause of action" (obviously under O. 18 r. 19 of the Rules of the High Court 1980).

Appellants had filed two affidavits as well as various documents in support of their application. Counsel for the respondents/plaintiffs very properly objected to the admissibility of such evidence for the purposes of this application in view of the express prohibition contained in O. 18 r. 19(2), and the learned Judge accordingly proceeded to consider the application without regard for such evidence. Since Mr. Nathan for the appellants conceded that the affidavits and documents are indeed inadmissible, we need not dwell any further on this aspect of the application.

In their writ and statement of claim the respondents alleged that on or about 9 October 1978 the 1st respondent had agreed to purchase and the 1st appellant had agreed to sell to him a piece of land together with a house to be erected thereon for RM55,000.

In para. 2 of the statement of claim it was further alleged that the land to be sold under the agreement was in Johore Bahru, 1430 sq. feet in area and held under HS(D) 19309 for Lot TLO No. 10463, and that 1st appellant was to erect on it a double storey terraced house in accordance with the Housing Developers Rules 1970, and with the specifications contained in a brochure prepared by the 1st appellant and given or shown to the 1st respondent.

In para. 3 respondents claim that the purchase price (presumably progress payments) would be paid by 1st respondent to 1st appellant in accordance with the schedule of payments contained in the brochure aforementioned.

The 1st respondent then according to the statement of claim paid 1st appellant the sum of RM1000 as deposit and part payment, for which a receipt was issued dated 9 October 1978. 1st respondent then assigned to 2nd respondent all her interest in the property in writing for RM2000, on 4 November 1978 and gave notice of the assignment to 1st appellant on or about 28 December 1978.

Having consented to the assignment, the 1st appellant then sent to 2nd respondent's solicitors 3 sets of a formal agreement to be executed by the former, which respondents alleged contained terms which were in breach of the Housing Developers Rules 1970, and were in addition inconsistent with the terms of the agreement allegedly concluded on 9 October 1978 (referred to in para. 4 of the statement of claim) some of which were particularly enumerated by the learned Judge, *viz*:

(a) power given to 1st defendant to increase the price unilaterally;

(b) requirement for 1st plaintiff to pay for improvement of river, Sungai Sengkuang;

(c) power given to 1st defendant to terminate the agreement by returning all sums of money received;

(d) requirement for the plaintiff to pay for costs of electricity, water and sewerage connections outside the house; and many others.

The 2nd respondent's solicitors wrote to 1st appellant to amend the draft agreement to conform with the Housing Developers Rules and to the agreement of 9 October 1978, but instead on 26 March 1980, 1st appellant wrote to the former repudiating the agreement (para. 10 of statement of claim), presumably referring to the alleged agreement of 9 October 1978 on the ground that he did not agree with the amendments proposed by 2nd respondent.

On 9 July 1979, and unknown to respondents, it was alleged that 1st appellant conveyed the land to 2nd appellant. Respondents claim that 2nd appellant had knowledge and is bound by the agreement of 9 October 1978, and alternatively that this transfer was fraudulent.

In passing we should mention that four similar actions wherein similar questions of law and fact are involved have with the concurrence of the respective plaintiffs been consolidated under O. 4 with this suit.

In the Court below, it was urged on behalf of the present appellants that para. 7 and 8 of the statement of claim show that the respondents had refused to complete the agreement, and that para. 14 merely indicated that they were ready and willing to sign the agreement, but there was neither a written nor an oral one. In short there was no formal agreement as is required by r. 12 of the Housing Developers (Control and Licensing) Rules 1970.

The learned Judge considered r. 10(3) of the Rules above mentioned and said:

> Where, as in this case, the plaintiff has paid his deposit towards the purchase of the accommodation, accompanied with the draft agreement shown to the plaintiff, the rule imposes an irrevocable option to the plaintiff giving him the right to purchase. This, in itself, in my view, gives rise to a legally binding contract between the parties, although the terms have yet to be agreed and to be evidenced in writing as required under r. 12(1) of the Rules.

His Lordship cited the Singapore decision *Yeo Long Seng v. Lucky Park (Pte.) Ltd.* [1971] 1 MLJ 21 with approval and dismissed the application.

Mr. Nathan, for the appellants says that *Yeo Long Seng's* case should be distinguished from the present appeal. There the successful plaintiff, apart from paying the deposit had been asked to sign a letter addressed to the defendants which contained the terms of the instalment payments to be made to the latter, and which concluded with the following paragraph:

> I hereby agree to sign the agreement within 14 days on receipt of the vendor's notice for signing the same; failing which the vendor is entitled to cancel the booking and recall the property ...

In the present appeal, he points out, nowhere has the purchaser signed a document committing himself to purchase.

We were also referred to two other decisions, *Rajeswari Thedshanamurthy v. Kin Nam Realty Development Sdn. Bhd.* [1982] CLJ (Rep) 716 and *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor.* [1892] 3 Ch. 274, in which the respective plaintiffs had succeeded in their action only because they had signed documents which were held to be firm contracts, a factor which does not exist in the present action.

A number of similar decisions were also cited to which we need not refer.

We think it will suffice for us to refer to the well known authority *A.G. of Duchy of Lancaster v. L. & N.W. Railway Co.* [1892] 3 Ch. 274 in which it was held that the summary procedure under the English rule which is identical to ours, can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable". On the face of the claim before us, we are unprepared to say that it is obviously so.

Accordingly we dismiss this appeal with costs. Deposit to respondent to account of taxed costs.

Also found at [1982] CLJ 536